



## INTERIOR BOARD OF INDIAN APPEALS

Estate of Vivian M. Rogers v. Acting Muskogee Area Director,  
Bureau of Indian Affairs

14 IBIA 217 (08/08/1986)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ESTATE OF VIVIAN M. ROGERS

v.

ACTING AREA DIRECTOR, MUSKOGEE AREA OFFICE,  
BUREAU OF INDIAN AFFAIRS

IBIA 86-13-A

Decided August 8, 1986

Appeal from a determination that income accruing from an Osage Indian headright should be paid to the remaindermen rather than to the estate of the deceased life tenant.

Affirmed.

1. Indians: Osage Headrights

Income accruing from an Osage Indian headright is properly paid to the owner or owners of the headright on the segregation date.

APPEARANCES: Robert P. Kelly, Esq., Pawhuska, Oklahoma, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

The Board of Indian Appeals (Board) received the administrative record in this case on November 14, 1985. The appeal was forwarded to the Board by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary) in accordance with the provisions of 25 CFR 2.19. <sup>1/</sup> Joe Watts (appellant), executor of the estate of Vivian M. Rogers, seeks review of a March 31, 1982, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (BIA; appellee). The decision held that the September 1980 Osage headright payment had properly been made to the remaindermen under the will of Richard Lewis Rogers (Rogers), Osage Allottee No. 1842, deceased (unrestricted), rather than to the estate of Vivian M. Rogers, Rogers' deceased wife and the life tenant of the headright. For the reasons discussed below, the Board affirms that decision.

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<sup>1/</sup> Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

### Background

In 1872 Congress set apart and confirmed a reservation for the Osage Tribe (tribe) in north central Indian Territory, in what is now the State of Oklahoma. The reservation was leased in 1896 for oil and gas exploration and development. Substantial oil discoveries were made in 1904 and 1905. In 1906, Congress provided for allotment of the Osage Reservation and for preparation of a tribal roll. The tribal mineral estate was severed and retained in tribal trust ownership, but most of the income from it was to be paid per capita to the persons on the tribal roll or their heirs. See Act of June 28, 1906, § 4, 34 Stat. 539, 544; Act of March 2, 1929, § 1, 45 Stat. 1478; Act of June 24, 1938, § 3, 52 Stat. 1034, 1035; Act of October 21, 1978, 92 Stat. 1660.

The right to share in the distribution of royalties and bonuses arising from the tribal mineral estate has come to be called an Osage headright. Before payments are made to individuals, BIA withdraws those amounts mandated by Congress for such purposes as specified tax payments to the State of Oklahoma and certain tribal expenses. The remainder of the money is divided among those individuals holding interests in a headright in proportion to their ownership interest. This division is called segregation. Segregation normally occurs in the month following the end of a fiscal quarter, with actual payment being made later. 2/

Rogers owned a 1.0000 interest in an Osage headright. He died testate on August 30, 1961. Pursuant to section 3 of the Act of April 18, 1912, 37 Stat. 86, his estate was probated in the County Court of Osage County, State of Oklahoma. In the Matter of the Estate of Richard Lewis Rogers, No. 7382 (Cty. Ct. Osage Cty., Okla. Jan. 11, 1963). Rogers' will, which was approved by the court, left a life estate in his headright to his wife, Vivian Rogers, a non-Indian. The remainder interest in the headright was left equally to his four nieces and nephews, Charles Rogers, Richard Rogers, Teleia Maher, and Jan Maher. 3/

Vivian Rogers died on July 17, 1980. On July 18, 1980, Osage oil and gas royalties and bonuses for April, May, and June 1980 were segregated. On September 15, 1980, BIA paid \$6,850 to the remaindermen under Rogers' will as the portion due to that headright.

Because appellant believed this payment should have been made to the estate of Vivian Rogers, he filed an appeal with the Osage Agency Superintendent, BIA. On October 4, 1980, the Acting Superintendent held that the payment was properly made to the remaindermen because Vivian Rogers was not alive on the segregation date of July 18, 1980.

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2/ For a succinct review of this background, see Cohen's Handbook of Federal Indian Law, 788-97 (1982 ed.).

3/ The record indicates that Jan Maher is deceased, and left as heirs Coletta Maher, Flower Maher, Jasimine Maher, and Rosita Maher.

Appellant appealed this decision to appellee. On March 31, 1982, appellee affirmed the Acting Superintendent's decision. Appellant filed a timely appeal with the Deputy Assistant Secretary, who referred the case to the Board on November 14, 1985. Only appellant filed a brief on appeal.

### Discussion and Conclusions

Appellee's decision in this case was based upon an April 1, 1943, opinion written by the Solicitor of the Department of the Interior, and approved by the Assistant Secretary on April 2, 1943. "Income from Osage Headrights," 58 I.D. 378 (1943). Consequently, the arguments raised concern the legal adequacy of that opinion. Appellant argues that the opinion is legally incorrect because it (1) fails to recognize that in probate matters the property of deceased members of the Osage Tribe is subject to the laws of Oklahoma, (2) fails to consider the effect of the Uniform Principal and Income Act, which he states has been in force in Oklahoma since May 31, 1941, and (3) misapplies the holding in Globe Indemnity Co. v. Bruce, 81 F.2d 143 (10th Cir. 1935), cert. denied, 297 U.S. 716 (1936).

There is no dispute in this case that Osage headrights constitute property subject to the probate jurisdiction of the Oklahoma county courts. Act of April 18, 1912, 37 Stat. 86; Globe Indemnity Co., *supra*, 81 F.2d at 150-51. Rather, the issue concerns the right to receive income from a headright. Appellant contends that Oklahoma law, as embodied in Okla. Stat. tit. 60, § 175.28 (1971), requires the finding that the income is payable to the person who owned the headright during the period in which the income accrued. Appellee's decision and the 1943 Solicitor's Opinion hold that the income is payable to the person owning the headright on the segregation date.

Title 60, section 175.28, of the Oklahoma Statutes provides:

Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans, and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this Section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates

of such periodic payments he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is to the total period during which such income would normally accrue; the remaining income shall be paid to the person next entitled to same.

Appellant argues that, in this case, section 175.28 requires the September 1980 quarterly payment to be made to the estate of the life tenant because all of the income accrued during April, May, and June of 1980, while she was still living, and that BIA erred in concluding that ownership of the headright on the segregation date determined the right to receive the quarterly payment. He further notes that the 1943 Solicitor's opinion analogizes headright income to income from corporate stock. He states that such income is expressly excluded from the coverage of section 175.28, and apparently therefore contends that headright income cannot be analogized to income from corporate stock.

The Oklahoma Statutes exclude corporate stock income from section 175.28 but address it separately in section 175.29. Section 175.29 4/ provides in pertinent part:

E. In applying this Section the person who is entitled to a dividend shall be the tenant at the time specified by the corporation as the one on which the stockholders entitled thereto are determined, or if no such time is specified then the tenant at the date of declaration of the dividend, shall be entitled thereto.

Oklahoma law thus provides for ownership of a corporate stock dividend by the tenant on the date specified by the corporation or, if no such time is specified, when the dividend is declared. If the analogy between corporate stock income and income from an Osage headright is correct, Oklahoma law would itself require that the payment at issue here be made to the owners of the headright on "the date of declaration of the dividend," i.e., the segregation date. However, this point need not be pursued further because it is Federal law, rather than Oklahoma law, that controls the outcome of this case.

Osage headrights constitute property created and, therefore, defined by Federal law. Federal statutes clearly provide that income from Osage oil and gas leases is tribal property until such time as the funds are segregated to the credit of individual tribal members. See Act of June 24, 1938, § 3, 52 Stat. 1034, 1035:

[A]ll royalties and bonuses arising therefrom [the disposal of oil and gas and other minerals] shall belong to the Osage Tribe of Indians, and shall be disbursed to members of the Osage Tribe

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4/ Section 175.28 derives from Laws 1941, at 259, § 28; section 175.29 derives from Laws 1941, at 259, § 29.

or their heirs or assigns as now provided by law, after reserving such amounts as are now or may hereafter be authorized by Congress for specific purposes.

In interpreting the analogous provisions of the 1906 Act, the United States Attorney General stated:

[I]t must be borne in mind that the mineral rights in the lands are reserved to the tribe, not to the individual member. The tribe was the entity considered by Congress in the provision with respect to leasing for minerals and the revenues or royalties obtained were considered as tribal funds first and not as individual royalties. The mineral leases were to be made through the Tribal Council with the approval of the Secretary of the Interior; the royalties were to be paid to the Osage Tribe (section 3). The individual member had no part in the leasing even of his own land. The entire matter was a tribal affair. Until they were placed to the credit of the individual Indian, they remained tribal funds.

33 Op. Att'y Gen. 60, 62 (1921). The Attorney General's Opinion is cited in the 1943 Solicitor's opinion, which also discusses the Department's longstanding position that "no individual interest vests in one entitled to share in the pro rata distribution of tribal funds until the Secretary of the Interior has segregated the pro rata share of the individual from the tribal funds." 58 I.D. at 382. See 25 CFR 233.4 (1938) ("On November 6, 1908, the Secretary of the Interior decided, in effect, that the interest of an Indian in a pro rata share of a tribal fund does not vest in the Indian as inheritable property until after \* \* \* an order [is] signed by [the Secretary of the Interior] segregating it from the tribal fund"). The identical regulatory provision has been set forth in 25 CFR 102.4 (1958), and presently appears in 25 CFR 112.4. See also Cohen, Handbook of Federal Indian Law, 193 (1942 ed.); Cohen's Handbook of Federal Indian Law, 790 n.187 (1982 ed.) ("However, individual rights in the [Osage] mineral income became vested only when the Secretary segregates shares"). Congress, which can be presumed to be aware of the Department's longstanding construction of these statutes, has taken no action to alter it.

Finally, appellant argues that the 1943 Solicitor's Opinion misapplies the holding in Globe Indemnity Co., supra, in particular, the following statement made by the court:

We hold the word "accrued" refers to interest and royalties that have arisen to the credit of the owner of the headright at the time of his death and the word "accruing" refers to the interest and royalties that will arise to the credit of his headright after his death and prior to the distribution of his estate.

81 F.2d at 153. Appellant argues that under the Solicitor's Opinion, no interest or royalties can ever accrue to a headright until segregation, in violation of the court's ruling that "[i]nterest on trust funds and the

mineral royalties are constantly accruing to the credit of owners of headrights." Id.

The discussion referred to by appellant interprets a statutory provision concerning deceased Osage Indians and relates to the purposes for which monies accrued or accruing to the credit of an Osage headright owner may be used by the decedent's executor. There was no question in Globe Indemnity Co. that all monies belonged to the decedent or his estate. The only question and the one with which the court was concerned was what monies were available to the executor for paying the decedent's funeral expenses, costs of administration and last illness, and legacies made in the will. The court also discussed the differences between such monies of (1) Osage Indians of one-half or more Indian blood who did not have certificates of competency, and (2) those of less than one-half Osage Indian blood and those of any blood degree who had certificates of competency. Likewise, the Solicitor's Opinion discussion of the holding in Globe Indemnity Co. deals with these questions. None of these issues arise in the present case because the non-Indian Vivian Rogers held only a life estate, which terminated by operation of law upon her death.

[1] The 1943 Solicitor's Opinion respects the congressionally mandated scheme concerning ownership of Osage headrights and the court decisions interpreting it. Appellee's decision is consistent with the Solicitor's Opinion. The Board finds no reason to overturn this long-established interpretation. Accordingly, the income credited to this headright was property paid to the headright owners on the segregation date; i.e., the remaindermen under Rogers' will.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 31, 1982, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs, is affirmed.

//original signed

Anita Vogt  
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn  
Administrative Judge